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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 461

POLICE BENEVOLENT ASSOCIATION OF THE NEW YORK STATE POLICE, INC. and JOHN H. McCADDIN,

Petitioners,

v.

ROBERT J. TRAINOR, District Attorney of Westchester County, State of New York, and ARTHUR CORNELIUS, JR., Superintendent of State Police of the State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

ARTHUR L. REUTER,
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165 Broadway,
New York 6, N. Y.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, in the case entitled in that court: "In the Matter of the Application of POLICE BENEVOLENT ASSOCIATION OF THE NEW YORK STATE POLICE, INC. and JOHN H. McCADDIN, Petitioners-Appellants, against JOSEPH F. GAGLIARDI, District Attorney of Westchester County, and FRANCIS H. McGARVEY, Superintendent of State Police, Respondents, to vacate a Search Warrant issued by Hon. Hugh S. Coyle, County Judge of Westchester County, on February 19, 1959", said judgment of the Court of Appeals having been entered in said case on March 30, 1961.

During the pendency of this case, Joseph F. Gagliardi has been succeeded as District Attorney of the said County, by Robert J. Trainor, and Francis H. McGarvey has been succeeded as Superintendent of State Police of said State of New York, by Arthur Cornelius, Jr.

Citations to Opinions Below

The opinion of the County Judge of Westchester County is unreported and is printed in Appendix B hereto, *infra*, page 20. The opinion of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, is reported in 9 A. D. 2nd 929, 195 N.Y.S. 2d 109, and is printed in Appendix B hereto, *infra*, page 20. The opinion of the Court of Appeals of the State of New York is reported in 9 N. Y. 2d 803, 215 N.Y.S. 2d 513, and is printed in Appendix B hereto, *infra*, page 21. The opinion of the Court of Appeals of the State of New York denying the petitioners' motion to amend the remittitur has not yet been reported and is printed in Appendix B hereto, *infra*, page 25. The opinion of the Court of Appeals of the State of New York denying the petitioners' motions for reargument of the case has not yet been reported and is printed in Appendix B hereto, *infra*, page 24.

Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered on March 30, 1961. A timely petition for a rehearing (reargument) filed June 22, 1961, was denied on July 7, 1961. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(3), since a right and immunity is specially set up and claimed under the Constitution of the United States.

How the Federal Questions Are Presented

The federal questions sought to be reviewed were not raised in the court of first instance (County Court of Westchester County), because such questions did not become pertinent until the court of first instance had made the decision appealed from. In the first appellate court, namely the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, the petitioners, by brief and by oral argument, raised the following federal question, to wit, that due process of law required that the search warrant be vacated. The said Appellate Division did not rule upon the question so raised. All of the federal questions raised herein were raised in the Court of Appeals of the State of New York by brief and oral argument, but were not mentioned in the opinion of said court (Appendix B, p. 21). The federal questions were again raised on petitioners' motion in the Court of Appeals for reargument (rehearing) and for amendment of the remittitur (Appendix C, pp. 24, 25). The Court of Appeals denied the motion to amend the remittitur upon the ground that the federal constitutional questions raised by the petitioners were not considered in view of the said court's holding that there is no statutory authority in New York providing for an appeal from the order of the court of first instance denying the motion to vacate the search warrant (Appendix B, p. 25).

Questions Presented

1. Whether an order of a magistrate in a state criminal court which arbitrarily denies a motion to vacate a search warrant issued without proof of probable cause as required by the statutes of the state is void as violating due process under the Fourteenth Amendment of the Constitution of the United States.

2. Whether a state statute is invalid as violative of due process under the Fourteenth Amendment of the Constitution of the United States which fails to grant a right of appeal to one whose property was seized under a search warrant issued without the proof of probable cause required by state statutes and whose application to vacate the search warrant on that ground and for the return of his property was arbitrarily denied by the magistrate issuing the warrant.

Statutes Involved

The statutes involved are Constitution of the State of New York, Article 1, Section 12; Code of Criminal Procedure of the State of New York, Sections 517, 791, 792, 793, 794, 795, 796, 797, 802, 803, 804, 805, 806, 807, 808, 809; Civil Practice Act of the State of New York, Article 78, Section 1285, Subdivision 2.

Statement

Petitioner Police Benevolent Association of the New York State Police, Inc. (hereinafter referred to as P.B.A.) is a membership corporation, its active membership consisting of New York State Troopers. Its chartered purposes include the rendering of aid to the members, the furtherance of their interests and the improvement of their general welfare (fol. 25).

Petitioner John H. McCaddin (hereinafter referred to as McCaddin) is an attorney-at-law, duly admitted to practice in this state and maintaining his law office at No. 170 Broadway, Borough of Manhattan, New York City, in the County of New York. He is the secretary of P.B.A. as well as its counsel (fols. 23, 41).

P.B.A.'s principal office is in McCaddin's suite at 170 Broadway (fol. 23).

On September 30, 1958, P.B.A.'s executive board voted to publish a Fifteenth Anniversary Yearbook in 1959 and to sell advertising in it in order to obtain funds for the purposes of the Association (fol. 26). P.B.A. entered into a written agreement with one Stone, under which Stone was to solicit advertising for the book and to publish it for P.B.A. at Stone's expense. Stone was to receive 45% of the proceeds of the advertising and P.B.A. was to receive the remaining 55%. Solicitation was to be by mail, exclusively (fols. 27-32). In practice, Stone received only 40%, P.B.A. retaining 5% additional as security for performance of the whole contract by Stone.

On February 19, 1959, Staff Inspector Joseph W. Sayers of the State Police, by affidavit sworn to that day (Exhibit III, fol. 103), applied for a warrant to search McCaddin's law office.

The affidavit contained three brief paragraphs.

In the first paragraph, Sayers stated:

> "That he is Staff Inspector, Bureau of Criminal Investigation, New York State Police and has been investigating alleged violations of the Penal Law of the State of New York concerning the extortion and the fraudulent obtaining of property for alleged charitable purposes in the City, County and State of New York." (fol. 104)

In the second paragraph, the affiant stated that he wanted to search the offices of John H. McCaddin and/or Morris L. Cohen (omitting to state that these are law offices) at 170 Broadway, Manhattan,

> "for any and all books, records, documents, check books, checks and cancelled checks, files and correspondence and other paraphernalia used in connection with the solicitation of funds allegedly on behalf of the Police Benevolent Association of the New York

> State Police, Inc., the Police Benevolent Association 15th Anniversary Year Book and the Purple Heart Veterans; deponent believes that a search will reveal such articles used in the operation described aforesaid." (fol. 105)

In the third and final paragraph, Mr. Sayers stated that he "verily believes that a search of the premises mentioned will disclose evidence of violations of the Penal Law of the State of New York" (fol. 105).

There was, therefore, a failure to comply with Sections 792, 793, 794 and 795 of the New York Code of Criminal Procedure, in that the deposition stated no facts tending to establish statutory grounds or probable cause for believing the existence of such grounds.

The warrant granted by the Westchester County Judge (Exhibit II, fol. 97) recites that "Proof by affidavit having been this day made before me by Joseph W. Sayers that there is probable cause for believing that the crime of Extortion and/or a Violation of Section 934 of the Penal Law of the State of New York has been violated by John H. McCaddin and/or Morris L. Cohen, * * * and that evidence of same may be obtained by making a search of the premises located at 170 Broadway * * *" commands the Sheriff of Westchester County or any peace officer to make a search of the offices of John H. McCaddin and/or Morris L. Cohen "for the following property:

> all books, records, documents, check books, checks and cancelled checks, files and correspondence in connection with solicitations for Police Benevolent Associations, Police Benevolent 15th Anniversary Year Book and Purple Heart Veterans." (fol. 100)

Armed with the warrant, officers of the State Police and of the Westchester County District Attorney entered the office of petitioners and under the purported authority

of the said warrant, seized and removed P.B.A. property (fol. 35). Included in the seizure were an addressograph machine, membership cards, check books and cancelled checks (Exhibit 1, fol. 43).

Thereafter, Stone was indicted by the Westchester County April Grand Jury on counts of violation of Section 934 of the Penal Law and Grand Larceny (fols. 33, 108). The gist of the charges against Stone is that, posing as a member of the State Police, he made misrepresentations and employed threats and improper promises in order to obtain advertising contracts and the checks which necessarily came with them. Subsequently, three employees of Stone were also indicted. The indictments were not brought to trial.

McCaddin testified before the Grand Jury at his own request, waiving immunity. The other officers of P.B.A. also waived immunity and testified. Neither petitioners nor any officer of P.B.A. were indicted.

Petitioners moved to vacate the search warrant against McCaddin on the ground that it was invalid for absence of proof of probable cause as required by Sections 792-795, inclusive, of the Code of Criminal Procedure and that the seizure of P.B.A. property thereunder was unlawful (fol. 24).

The motion came on in Westchester County Court before Hopkins, J. and was by him referred to Judge Coyle, who had signed the warrant. No additional testimony or other proof of facts were received. Judge Coyle denied the application to vacate (fol. 127).

Thereafter some of the seized items were surrendered to P.B.A. Other items seized under the warrant are still withheld.

An appeal was taken to the Appellate Division of the Supreme Court of the State of New York, Second Judicial

Department, which dismissed the appeal on the ground that no provision existed for a proceeding to vacate a search warrant or for an appeal in such a proceeding from the order denying the application to vacate (Appendix B, *infra*, p. 20).

An application for leave to appeal to the Court of Appeals of the State of New York was denied by the said Appellate Division, but the said Court of Appeals granted such leave.

The Court of Appeals thereafter affirmed the order of the Appellate Division, stating in its opinion that the Appellate Division was correct in holding that no appeal lies from an order denying petitioners' application to vacate a search warrant, and for the return of the property seized thereunder, as this is an order in a criminal cause, an appeal from which is not provided for under the Code of Criminal Procedure (Appendix B, *infra*, p. 21).

The petitioners' motion for a rehearing was denied by the Court of Appeals, and petitioners' motion for amendment of the remittitur was denied on the ground that the federal questions raised by the petitioners on the appeal were not considered by the Court in view of their holding (Appendix B, *infra*, p. 25).

Reasons for Granting the Writ

The Constitution of New York, Article 1, Section 12, reads:

> "The right of the people to be secure in their persons, houses, papers, and effects, shall not be violated, and now warrants shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons or things to be seized. . . ."

The New York Code of Criminal Procedure, Section 792, states the only grounds on which search warrants may be issued. The grounds did not exist in this instance. The deposition supporting the warrant was necessarily barren of facts tending to establish such statutory grounds and was barren also, of facts tending to establish probable cause for believing that such grounds existed, as required by Code Cr. Pr. Sections 793 and 795.

Since there was no proof of probable cause, the issuance of the warrant violated petitioners' rights and immunities as given by the State Constitution.

The New York Code of Criminal Procedure, in Sections 807-809, inclusive, also provide a procedure under which a search warrant may be controverted as to grounds of issuance or probable cause for believing in such grounds. An application was made to vacate the warrant here and to have the property returned.

The judge who issued the warrant heard the application and denied it, even though he had no proof and took no proof of grounds or of probable cause. The order denying the application was wholly arbitrary and illegal. It worked that fundamental unfairness which is at war with due process. *Thompson* v. *Louisville*, 362 U. S. 199, 4 L. ed. 2nd 654, 80 S. Ct. 624; *Lisenba* v. *California*, 314 U. S. 219, 238, 86 L. ed. 166, 182, 62 S. Ct. 280; *Akins* v. *Texas*, 325 U. S. 398, 402, 89 L. ed. 1692, 1695.

According to the Court of Appeals' holding, a judicial process to correct the magistrate's wrong is not available to the petitioners. Thus, as to the petitioners the magistrate is vested with absolute and arbitrary power, and due process is thus further violated. *Hurtado* v. *California*, 110 U. S. 516, 535, 536, 28 L. ed. 232, 4 S. Ct. 111, 292; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369, 370, 30 L. ed. 220, 6 S. Ct. 1064.

The effect of the decision of the New York Court of Appeals is to annul, as to state officials, both state consti-

tutional restrictions on unlimited search and seizure and the federal constitutional requirement of due process in the issuance of search warrants.

The Court of Appeals holds that even though no probable cause for the warrant existed and even though the petitioners' motion to vacate was denied arbitrarily by the issuing magistrate, the petitioners have no remedy under the law of the state.

What the State Constitution has forbidden has been done to them, but they have no remedy.

The New York Court of Appeals is deservedly esteemed and its decisions influence decisions by courts in other states.

Unless the Supreme Court otherwise settles the law in this case, houses, shops and offices across the land will, under the influence of this decision, be open to invasion by state officers with impunity.

Statutes modeled on the New York statute, as now construed by the Court of Appeals, will be urged upon state legislatures by zealous police and prosecutors, and will probably be interpreted by the respective state courts in accordance with this Court of Appeals' holding.

Ironically, only the innocent bystander is deprived of protection under the Court of Appeals decision. Should evidence of crime be seized under the invalid warrant and an indictment follow, the indicted defendant has a right of appeal from conviction under the New York statute (C. Cr. Pr. 517, Apendix A, *infra*, p. 12). Since the Supreme Court has now settled that evidence illegally obtained may not be used in state courts (*Mapp* v. *Ohio*, 6 L. ed. 2, 1081, 81 S. Ct. ——, —— U. S. ——), a judgment based on such evidence undoubtedly would be reversed by the state appellate court.

But under the Court of Appeals decision, only defendants in criminal cases have a right of appeal. Where no evidence is found and no charge follows, the searched citizen has no remedy, where his application to vacate the warrant and to return his goods is arbitrarily denied.

He may not appeal to a higher court nor may he sue to replevy the goods (*Meegan* v. *Tracy*, 220 A. D. 660, 223 N.Y.S. 355; *Simpson* v. *St. John*, 93 N. Y. 363).

Nor may he sue in conversion for damages, for the presumption of validity protects the officers who executed the warrant.

Nor may he seek a writ of prohibition or mandamus (CPA, Art. 78, Secs. 1283, 1285, Appendix A, *infra*, p. 19).

Unless this court requires a corrective judicial process be made available for those in the hapless position of these petitioners, due process in the area of search warrants will be violated consistently and with impunity.

CONCLUSIONS

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ARTHUR L. REUTER,
Counsel for Petitioners.

Dated: September 29, 1961.

APPENDIX "A"

Constitution of the State of New York

ARTICLE 1

Section 12. (*Security against unreasonable searches, seizures and interceptions.*)

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof.

Code of Criminal Procedure of the State of New York

Section 517. *In what cases appeal may be taken by defendant.*

An appeal may be taken by the defendant as of right from a judgment on a conviction in a criminal action or proceeding as follows:

1. Where the judgment is of death, directly to the court of appeals;

2. Where the judgment is other than of death, in the city of New York, (a) to the appellate division of the

supreme court of the department in which the conviction was had, from a conviction by the supreme court or by the court of general sessions of the county of New York or a county court, or from a conviction by a court of special sessions; (b) to the appellate part of the court of special sessions, from a conviction by a city magistrate.

3. Where the judgment is other than of death, elsewhere than in the city of New York, unless otherwise specially provided by law, (a) to the appellate division of the supreme court of the department in which the conviction was had, from a conviction by the supreme court or a county court; (b) to the county court of the county in which the conviction was had, from a conviction by a court of special sessions, police court, police magistrate or justice of the peace.

An appeal may be taken as of right by the defendant from an order denying a motion to vacate a judgment of conviction, otherwise known as a motion or application for a writ of error coram nobis, to the court to which an appeal from the judgment of conviction would lie as provided in this section, except that such an appeal shall lie only directly to the court of appeals by permission as provided in section five hundred twenty where the judgment is of death.

Upon any appeal from a judgment on a conviction, any actual decision of the court in an intermediate order or proceeding forming a part of the judgment-roll, as prescribed by section four hundred eighty-five, may be reviewed. For every purpose of an appeal herein, including a review of such intermediate orders or proceedings, a conviction shall be deemed a final judgment although sentence has been or may thereafter be suspended by the court in which the trial was had, or otherwise suspended or stayed; but a judgment of affirmance upon any such

appeal shall not operate to exclude an appellant, otherwise entitled thereto, from the right of suffrage.

Section 791. *Search warrant, defined.*

A search warrant is an order in writing in the name of the people, signed by a magistrate, directed to a peace officer, commanding him to search for personal property, and bring it before the magistrate.

Section 792. *Upon what grounds it may be issued.*

It may be issued upon either of the following grounds:

1. When the property was stolen or embezzled; in which case, it may be taken, on the warrant, from any house or other place in which it is concealed, or from the possession of the person by whom it was stolen or embezzled, or of any other person in whose possession it may be;

2. When it was used as the means of committing a felony; in which case, it may be taken on the warrant, from any house or other place, in which it is concealed, or from the possession of the person by whom it was used in the commission of the crime, or of any other person in whose possession it may be;

3. When it is in the possession of any person, with the intent to use it as the means of committing a public offense, or in the possession of another, to whom he may have delivered it for the purpose of concealing it, or preventing its being discovered; in which case, it may be taken, on the warrant, from such person, or from a house or other place occupied by him, or under his control, or from the possession of the person to whom he may have so delivered it.

Appendix "A."

Section 793. *It cannot be issued but upon probable cause, supported by affidavit.*

A search warrant cannot be issued, but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property, and the place to be searched.

Section 794. *Before issuing warrant, magistrate must examine, on oath, the complainant and his witnesses.*

The magistrate must, before issuing the warrant, examine, on oath, the complainant and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them.

Section 795. *Depositions, what to contain.*

The depositions must set forth the facts tending to establish the grounds of the application, or probable cause for believing that they exist.

Section 796. *Magistrate, when to issue warrant.*

If the magistrate be thereupon satisfied of the existence of the grounds of the application, or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a peace officer in his country, commanding him forthwith to search the person or place named, for the property specified, and to bring it before the magistrate.

Section 797. *Form of search warrant.*

The warrant must be in substantially the following form:

"County of Albany (or as the case may be),

"In the name of the people of the state of New York:

Appendix "A."

"To any peace officer in the county of Albany, (or as the case may be) proof by affidavit having been this day made before me, by (naming every person whose affidavit has been taken), that (stating the particular grounds of the application, according to section seven hundred and ninety-two or if the affidavit be not 'positive that there is probable cause for believing that' stating the ground of the application in the same manner).

"You are therefore commanded in the day time, (or 'at any time of the day or night', as the case may be, according to section eight hundred and one) to make immediate search on the person of C.D., (or 'in the building situated,' describing it, or any other place to be searched, with reasonable particularity as the case may be,) for the following property; (describing it with reasonable particularity), and if you find the same, or any part thereof, to bring it forthwith before me at (stating the place).

"Dated at the city of Albany (or as the case may be,) the ..... day of ..... eighteen hundred .....

E. F.
Justice of the peace of the city (or town) of (or as the case may be)."

Section 802. *Within what time warrant must be executed and returned.*

A search warrant must be executed, and returned to the magistrate by whom it was issued, within ten days after its date. After the expiration of such time, the warrant, unless executed, is void.

Section 803. *Officer to give receipt for property taken.*

When the officer takes property under the warrant, he must give a receipt for the property taken, (specifying it in detail,) to the person from whom it was taken by him,

or in whose possession it was found, or, in the absence of any person, he must leave it in the place where he found the property.

Section 804. *Property, when delivered to magistrate, how disposed of.*

When the property is delivered to the magistrate, he must, if it was stolen or embezzled, dispose of it as provided in sections six hundred and eighty-seven or six hundred and eighty-nine, both inclusive. If it were taken on a warrant issued on the grounds stated in the second and third subdivisions of section seven hundred and ninety-two, he must retain it in his possession, subject to the order of the court to which he is required to return the proceedings before him, or of any other court in which the offense, in respect to which the property was taken, is triable.

Section 805. *Return of warrant, and delivery to magistrate of inventory of property taken.*

The officer must forthwith return the warrant to the magistrate, and deliver to him a written inventory of the property taken, made publicly, or in the presence of the person from whose possession it was taken and of the applicant for the warrant, if they be present, verified by the affidavit of the officer, and taken before the magistrate, to the following effect: "I, A. B., the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant."

Section 806. *Magistrate to deliver copy of inventory to the person from whose possession property is taken, and to applicant for warrant.*

The magistrate must thereupon, if required, deliver a copy of the inventory to the person from whose posses-

sion the property was taken, and to the applicant for the warrant.

Section 807. *If grounds for warrant controverted, magistrate to take testimony.*

If the grounds on which the warrant was issued be controverted, the magistrate must proceed to take testimony in relation thereto.

Section 808. *Testimony, how taken and authenticated.*

The testimony given by each witness must be reduced to writing and authenticated in the manner prescribed in section two hundred.

Section 809. *Property, when to be restored to person from whom it was taken.*

If it appear that the property taken is not the same as that prescribed in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause it to be restored to the person from whom it was taken.

New York Civil Practice Act

Article 78 Proceeding Against a Body or Officer.

Section 1283. *Classifications of certiorari to review; mandamus and prohibition abolished.* The classifications, and writs and orders of certiorari to review, mandamus and prohibition are hereby abolished. The relief heretofore obtained by such writs or orders shall hereafter be obtained as provided in this article. Whenever in any statute reference is made to a writ or order of certiorari,

mandamus or prohibition, shall reference, shall, so far as applicable, be deemed to refer to the proceeding authorized by this article.

Section 1285. *When relief not available.* Except as otherwise expressly prescribed by statute, the procedure under this article shall not be available to review a determination in any of the following cases:

1. Where it was made in a civil action or special proceeding by a court of record or a judge of a court of record except an order summarily punishing a contempt of court committed in the immediate view and presence of such court or judge.

2. Where it was made in a criminal matter, except a criminal contempt of court committed in the immediate view and presence of the court and punished summarily.

3. Where it does not finally determine the rights of the parties with respect to the matter to be reviewed.

4. Where it can be adequately reviewed by an appeal to a court or to some other body or officer.

5. Where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioner's application; unless the determination to be reviewed was made upon a rehearing, or a rehearing has been denied, or the time within which the petitioner can procure a rehearing has elapsed.

APPENDIX "B"

Opinions and Judgment Below

OPINION OF THE COURT OF FIRST INSTANCE—COUNTY COURT OF WESTCHESTER COUNTY, NEW YORK

(By Hon. Hugh S. Coyle, County Judge)

Matter of Police Benevolent Ass'n of State of N. Y. State Police Inc.—This is an application made on behalf of Police Benevolent Association of the State of New York State Police, Inc. and John H. McCaddin to vacate a search warrant issued by the court on February 19, 1959, and for the return of property seized thereunder. Upon examination of the papers submitted herein and after hearing the argument of counsel this court is satisfied that there has been compliance with the requirements of law relative to the issuance of the search warrant. Application is in all respects denied. Settle order.

OPINION OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT

By Nolan, P. J.; Ughetta, Hallinan and Kleinfeld, J. J. (Murphy, J., Deceased)

Matter of Police Benevolent Association of the New York State Police, Inc., ap. (Gagliardi, res.)—Appeal from an order of the County Court, Westchester County, which denied an application to vacate a search warrant issued under Section 791-813 of the Code of Criminal Procedure. The application was made on the ground that the deposition in support of the issuance of the warrant does not satisfy the terms of section 795 in that it fails to set forth facts tending to establish the grounds for issuance of the

warrant, which are set forth in section 792, and in that it fails to set forth facts establishing probable cause for believing that such grounds exist. Appeal dismissed. We do not find in the Code of Criminal Procedure any provision for a proceeding to vacate a search warrant or for an appeal in such a proceeding from an order denying the application to vacate (Cf. *People ex rel Simpson Co.* v. *Kempner*, 208 N. Y. 16; *People* v. *Ruth*, 250 App. Div. 819).

OPINION OF THE COURT OF APPEALS OF NEW YORK, AFFIRMING THE COURTS BELOW

The Appellate Division was correct in holding that no appeal lies from the order denying appellants' application to vacate a search warrant and for the return of property seized thereunder, as this is an order in a criminal cause, an appeal from which is not provided for under the Code of Criminal Procedure. No opinion. All Concur.

JUDGMENT OF THE COURT OF APPEALS OF NEW YORK, SOUGHT TO BE REVIEWED

COURT OF APPEALS

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 30th day of March in the year of our Lord one thousand nine hundred and sixty-one, before the Judges of said Court.

WITNESS,

The Hon. Charles S. Desmond,
Chief Judge, Presiding.
Raymond J. Cannon, Clerk

Appendix "B."

Remittitur . . . March 30, 1961

[TITLE]

BE IT REMEMBERED, That on the 21st day of September in the year of our Lord one thousand nine hundred and sixty,

Police Benevolent Association of the New York State Police, Inc., & ano.,

the appellants in this cause, came here unto the Court of Appeals, by Arthur L. Reuter, their attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department.

And Joseph F. Gagliardi, District Attorney of Westchester County, & ano., &c., the respondents in said cause, afterwards appeared in said Court of Appeals by Joseph F. Gagliardi, District Attorney, who also appears in person. Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by

Mr. Arthur L. Reuter,
of counsel for the appellants, and by

Mr. Warren J. Schneider,
of counsel for the respondents,

and after due deliberation had thereon, did order and adjudged that the order of the Appellate Division of the Supreme Court appealed from herein is affirmed. The Appellate Division was correct in holding that no appeal lies from the order denying appellants' application to vacate a search warrant and for the return of the property seized thereunder, as this is an order in a criminal cause,

an appeal from which is not provided for under the Code of Criminal Procedure.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the County Court, Westchester County, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, &c., as aforesaid,

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it is given in the premises, are by the said Court of Appeals remitted into the County Court, Westchester County, before the Judges thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said County Court, Westchester County, before the Judges thereof, &c.

Raymond J. Cannon
Clerk of the Court of Appeals
of the State of New York

Court of Appeals, Clerk's Office
Albany, March 30, 1961.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Raymond J. Cannon
Clerk

Appendix "B."

ORDER OF THE COURT OF APPEALS OF NEW YORK ON PETITIONERS' MOTION FOR REARGUMENT (REHEARING)

State of New York

in Court of Appeals

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the seventh day of July, A. D. 1961

Present, Hon. Charles S. Desmond, Chief Judge, presiding.

[TITLE]

A motion for a reargument of the above cause having been heretofore made upon the part of the appellants herein and papers having been duly submitted thereon and due deliberation thereupon had;

ORDERED, that the said motion be and the same hereby is denied.

Raymond J. Cannon
Clerk

Appendix "B."

ORDER OF THE COURT OF APPEALS OF NEW YORK ON PETITIONERS' MOTION TO AMEND THE REMITTITUR

State of New York

in Court of Appeals

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the seventh day of July, A. D. 1961

Present, Hon. Charles S. Desmond, Chief Judge, presiding.

[TITLE]

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had:

ORDERED, that the said motion be and the same hereby is denied upon the ground that the federal constitutional questions raised by appellants relating to the merits of this appeal were not considered in view of our holding that there is no statutory authority providing for an appeal from an order of this nature.

Raymond J. Cannon
Clerk

APPENDIX "C"

Documentation of Raising of Federal Constitutional Questions: Petitioners' Motion in New York Court of Appeals for Amendment of Remittitur

COURT OF APPEALS

OF THE STATE OF NEW YORK

In the Matter of the Application of POLICE BENEVOLENT ASSOCIATION OF THE NEW YORK STATE POLICE, INC. and JOHN H. MCCADDIN,

Petitioners-Appellants,

against

JOSEPH F. GAGLIARDI, District Attorney of Westchester County, and FRANCIS H. MCGARVEY, Superintendent of State Police,

Respondents-Respondents,

to vacate a search warrant issued by Honorable Hugh S. Coyle, County Judge of Westchester County, on February 19, 1959.

Notice of Motion.

SIR:

PLEASE TAKE NOTICE, that on the annexed affidavit of Arthur L. Reuter, sworn to the 20th day of June, 1961, and the record and briefs on this appeal, the said appellants will move the Court of Appeals, at the Court of Appeals Hall, Albany, N. Y., on the 6th day of July, 1961 at the opening of court on that day or as soon thereafter as counsel may be heard for an order

Appendix "C."

Notice of Motion.

(1) granting reargument of the appeal herein and on reargument reversing or otherwise modifying the decision of the Court, and

(2) in the event that reargument be denied or that the decision after reargument be substantially unchanged, certifying and making a part of the record in this case and of the order of this court determining the appeal, that in the prosecution of the appeal from the Appellate Division of the Supreme Court, Second Judicial Department, and in the arguments, both oral and by brief, made in this Court by the appellants, it was argued and relied upon by the appellants that the search warrant herein was illegal as violating the Fourth Amendment to the Constitution of the United States in that the said warrant was issued without probable cause supported by oath or affirmation; and, further, that the said order of the County Court of Westchester County, denying the appellants' motion to vacate the search warrant violated the Fourth and Fourteenth Amendments to the Constitution of the United States in that the said order sustained a search warrant issued without probable cause and in that said order was made arbitrarily and without evidence to sustain it; and, further, that the order of the Appellate Division of the Supreme Court, Second Judicial Department, dismissing the appeal to that court was illegal as violating the due process clause of the Fourteenth Amendment to the Constitution of the United States in that a judicial process was thereby denied to correct an invasion of the appellants' constitutional rights; and, further, that it was material to the determination of the said case in this court to de-

termine the said questions so made by the appellants and that the said questions were determined adversely to the said appellants by the order of affirmance made herein.

Dated, New York, N. Y. June 22, 1961.

Yours, etc.,

ARTHUR L. REUTER,
Attorney for Petitioners-Appellants
Office and Post Office Address
165 Broadway
New York 6, N. Y.

To:

ROBERT J. TRAINOR, Esq.,
District Attorney of Westchester County,
Attorney for the Respondents-Respondents,
County Court House,
White Plains, N. Y.

Appendix "C."

Affidavit in Support of Motion for Reargument.

[SAME TITLE]

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ARTHUR L. REUTER, being duly sworn, deposes and says:

1. I am the attorney for the petitioners-appellants herein and have been such attorney from the commencement of proceedings herein.

2. This appeal, taken by permission of this Court, was argued in this Court on February 23, 1961. It was decided March 30, 1961, as follows:

> "The Appellate Division was correct in holding that no appeal lies from the order denying appellants' application to vacate a search warrant and for the return of the property seized thereunder, as this is an order in a criminal cause, an appeal from which is not provided for under the Code of Criminal Procedure. No opinion. All concur."

3. To this date, respondents have not served upon appellants' attorney a copy of the order of affirmance.

4. The appeal to this Court was from an order of the Appellate Division, Second Judicial Department, dismissing an appeal from an order of the County Court, Westchester County, which denied an application to vacate a search warrant and to return property seized thereunder.

Appendix "C."

Affidavit.

5. In appellants' brief on appeal to this court, the following arguments were included:

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"Appellants' constitutional rights were violated both by the issuance of the search warrant and the order dismissing the application to vacate it." (citing, inter alia, Constitution of the United States, Fourth Amendment; McDonald v. United States, 335 U. S. 451.)

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"The deposition supporting the challenged warrant was wholly insufficient in that it failed to set forth any facts tending to establish the statutory grounds or probable cause for believing that they exist."

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"In opposing the application to vacate the respondents did not even contend that the Sayers affidavit contained any fact showing probable cause . . . that the affidavit, itself, did not contain proof of probable cause is indisputable and was not disputed.

"Thus, the Judge, in sustaining his own warrant, acted arbitrarily.

"Whether a citizen may be so flagrantly deprived of his constitutional rights and to what extent he is entitled to be heard in the courts are the questions now before this Court.

"Does the citizen whose property is so seized have a right to ask the court, out of which the warrant

issued, to vacate it? If the court denies the application arbitrarily . . . is there no right of appeal?

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"The decisions of the County Court and Appellate Division violate the Fifth and Fourteenth Amendments to the Constitution of the United States . . . in that they deny to the petitioners due process of law.

"Denial of due process is defined as "the failure to observe the fundamental fairness essential to the very concept of justice.' Lisenba v. California, 314 U. S. 219, 236, 62 S. Ct. 280, 290, 86 L. ed. 166."

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". . . when a constitutional right is violated, by arbitrary judicial action, a state 'is required to afford a corrective judicial process to remedy the alleged wrong . . .' United States v. Ragen (D.C.N.D. Ill.), 86 F. Sup. 382, 390, affirmed 178 F. 2nd 379 (C. A. 7th Cir.)

"Where the state fails to do so, the federal courts will." (Citing, Thompson v. Louisville, 4 Law ed. 654.)

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". . . There was a search and seizure under color of a warrant issued, in violation of the statute, without the deposition of any facts whatsoever. Thereafter, there was a denial of the appellants' application to vacate the warrant, despite the absence of the required sworn statement of facts.

Appendix "C."

Affidavit.

"Appellants' property was seized unlawfully and is withheld unlawfully. If there is no appeal, on the merits, from the arbitrary decisions of the county judge, there is a denial of due process of law."

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"Mistake, if any there was, in appellants' choice of procedure, should not have stood in the way of an order (of the Appellate Division) to protect the constitutional rights of the appellants by vacating the search warrant and ordering the restoration of appellants' property. (Interpolation supplied)

"Ample statutory authority, if it were needed, for such remedial action, exists in Civil Practice Act, Sections 111 and 132."

6. The same arguments, in substance, were made to this Court by the deponent on the oral argument of the appeal.

7. In its decision, this Court did not refer to the said constitutional questions and appellants conceive that the Court overlooked them and appellants ask for reargument of the appeal so that said questions may be considered by the Court.

8. In the event that, following this motion, the Court should adhere to its decision, the appellants propose to petition the United States Supreme Court for a writ of certiorari to review the decision because of the federal constitutional questions. In connection with such a petition, it will become necessary that the Supreme Court be

apprised that the said constitutional questions were raised by the appellants, and the certificate of this Court to that effect will be needed for a fair determination by the Supreme Court of the petition.

WHEREFORE, the appellants pray for an order

(1) granting reargument of the appeal herein and on reargument reversing or otherwise modifying the decision of the Court, and

(2) in the event that reargument is denied, or that the decision after reargument is substantially unchanged, certifying and making a part of the record in this case and of the order of this court determining the appeal, that in the prosecution of the appeal and in the arguments oral and by brief made in this Court by the appellants, the said federal constitutional questions were raised and were determined, and

(3) granting such other and further relief as may be just and proper.

ARTHUR L. REUTER.

(Sworn to before me this
20th day of June, 1961.)

DAVID J. FLEMING,
Notary Public, State of New York.
No. 41-6333400, Queens County.
Cert. filed in New York County.
Term Expires March 30, 1962.